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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

GLORIA ZAFIRO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

KRISTINA L. AMENT
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

QUESTION PRESENTED

Whether criminal defendants are entitled to separate trials
because they present antagonistic defenses.

GLORIA ZAFIRO, ET AL. PETITIONERS

V

UNITED STATES OF AMERICA

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) NO. 91-6824
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CERTIFICATE OF SERVICE

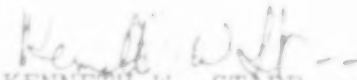
It is hereby certified that all parties required to be served
have been served copies of the BRIEF FOR THE UNITED STATES by mail
on February 26, 1992.

THOMAS M. BREEN
221 N. LASALLE STREET
SUITE 2100
CHICAGO, IL 60601

CHARLES ROBERTS
123 MILLS STREET
SUITE 306
EL PASO, TX 79901

STEVEN R. DECKER
221 N. LASALLE STREET
SUITE 1164
CHICAGO, IL 60601

KENNETH L. CUNIFF
20 S. CLARK STREET
SUITE 800
CHICAGO, IL 60603


KENNETH W. STARR
Solicitor General

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OPINION BELOW

The opinion of the court of appeals, Pet. App. A1-A11, is reported at 945 F.2d 881.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1991. The petition for a writ of certiorari was filed on December 23, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of various narcotics offenses. All four petitioners were convicted of

conspiring to possess cocaine, heroin, and marijuana with the intent to distribute it, in violation of 21 U.S.C. 846. In addition, petitioners Garcia and Soto were each convicted of possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and petitioner Martinez was convicted of possessing cocaine, marijuana, and heroin with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Garcia, Soto, and Zafiro were each sentenced to 151 months in prison, to be followed by five years of supervised release.¹ Martinez was sentenced to 262 months in prison, to be followed by five years of supervised release. Gov't C.A. Br. 3-4. The court of appeals affirmed. Pet. App. A1-A11.

1. Garcia, Soto, and Martinez were friends. Zafiro was Martinez's girlfriend. The evidence at petitioners' joint trial established that petitioners distributed illegal narcotics from Zafiro's apartment in Cicero, Illinois, and Soto's bungalow in Chicago, Illinois. On February 22, 1989, government agents followed Soto and Garcia as they transported a large, heavy box in Soto's Buick from his garage to Zafiro's apartment. A government agent followed Soto and Garcia up the stairs of Zafiro's building. After the agent identified himself, Soto and Garcia dropped the box and ran into Zafiro's apartment. Agents quickly followed, finding all four petitioners in the living room of the apartment. Pet. App. A2; Gov't C.A. Br. 7-9.

¹ The jury acquitted Zafiro of possession with intent to distribute controlled substances. Pet. App. A1.

The box that Soto and Garcia were carrying contained 55 pounds of cocaine. After obtaining a search warrant, agents found in Zafiro's bedroom closet a suitcase containing approximately 25 grams of heroin, 16 pounds of cocaine, and four pounds of marijuana. During a consensual search of a Ford Probe in Soto's garage, agents found approximately eight additional pounds of cocaine. The Ford Probe was registered to Maria Vera, another girlfriend of Martinez; he had bought the car for her but she had never used it. Pet. App. A2; Gov't C.A. Br. 9-11.

2. Pursuant to Fed. R. Crim. P. 14,² Garcia and Soto moved for severance of their trials on the ground that they intended to assert mutually antagonistic defenses. The district court denied their motions. Pet. App. A2; Gov't C.A. Br. 3. At trial, Soto testified that he knew nothing about the drug conspiracy. Rather, he claimed that Garcia had come to stay with him and had used the Buick and the Ford Probe. Soto further testified he had given Garcia an empty box at the latter's request and that he did not know that Garcia had placed the box in the trunk of the Buick until they arrived at Zafiro's apartment. Soto also stated that he did not know what was inside the box until it was opened after their arrest. Although Garcia did not testify, his theory of defense, as

² Rule 14, Fed. R. Crim. P., provides:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. * * *

presented by his lawyer during closing argument, was that the box belonged to Soto and that Garcia knew nothing about it. Pet. App. A3; Gov't C.A. Br. 13-14, 16-17.

Martinez unsuccessfully moved for a severance on the ground that Zafiro's defense was antagonistic to his own. Zafiro testified that Martinez stayed in her apartment from time to time but did not live there. She also testified that she did not know what was in the suitcase that was found in her bedroom closet. She stated that Martinez had brought the suitcase to her apartment two days before petitioners were arrested and that he did not tell her what was in the suitcase. Although Martinez did not testify, his lawyer argued that he did not know that any cocaine was going to be delivered to Zafiro's apartment or that the suitcase in Zafiro's closet contained drugs. Pet. App. A3; Gov't C.A. Br. 12-13, 22-24.

At the conclusion of the trial, the district court instructed the jury:

Where two or more persons are charged with the commission of a crime, the guilt of one defendant may be established without proof that each of the defendants performed every act constituting the crime charged. However, you must give separate consideration to each individual defendant and to each separate charge against him. Each defendant is entitled to have his or her case determined from his or her own conduct and from the evidence which may be applicable to him or to her.

8/15/89 Tr. 865.

3. The court of appeals affirmed, holding that the district court did not err by denying a severance to each of the defendants. Pet. App. A1-A11. The court noted that many cases have stated that

a defendant is entitled to a severance when the defendants present "mutually antagonistic defenses" such that the acceptance of one party's defense would lead the jury to conclude that the other party is guilty. Pet. App. A3-A4. The court refused to adopt that standard. It explained that "[t]he fact that it is certain that a crime was committed by one of two defendants is a reason for trying them together, rather than a reason against, to avoid the 'scandal and inequity of inconsistent verdicts.'" *Id.* at A4 (quoting *Richardson v. Marsh*, 481 U.S. 200, 210 (1987)). The court concluded that "persons charged in connection with the same crime should be tried separately only if there is a serious risk that a joint trial would prevent the jury from making a reliable judgment about the guilt or innocence of one or more of the defendants." *Ibid.* That issue, the court reasoned, should rarely be determined by reference to the existence of mutually antagonistic defenses: rather, "[i]f it is indeed certain that one and only one of a group of defendants is guilty, the entire group should be tried together, since in separate trials all might be acquitted or all convicted -- and in either case there would be a miscarriage of justice." *Id.* at A6.

The court offered two examples of such a case. First, in "a complex case with many defendants some of whom might be only peripherally involved in the wrongdoing," severance may be required because "the bit players may not be able to differentiate themselves in the jurors' minds from the stars." Pet. App. A4. Second, severance may be warranted "where exculpatory evidence essential to a defendant's case will be unavailable -- or highly prejudicial evidence unavoidable -- if he is tried with another defendant." *Id.* at A6.

The court of appeals found no basis for concluding that a joint trial would prevent a reliable jury verdict in this case:

Each member of each pair of defendants (Soto-Garcia and Martinez-Zafiro) was accusing the other of being a drug dealer. In this symmetrical situation, each defendant had to defend himself against the prosecutor and one other defendant but at the same time had a live body to offer the jury in lieu of himself (or herself). Soto could say, "Don't convict me, convict Garcia," and Garcia's lawyer could say, "Don't convict my client, convict Soto." This was apt to be a more persuasive line than telling the jury to let everyone go, when the one thing no one could question was that the government had found 75 pounds of cocaine on premises connected with these defendants. No defendant was placed at a net disadvantage by being paired with another defendant whom he could accuse and who could accuse him in turn, let alone so disadvantaged as to be unable to obtain a fair trial.

Pet. App. A6-A7. A joint trial, the court explained, offered the jury "the full picture," making it both less costly and less prone to error than separate trials would have been. *Id.* at A7.

ARGUMENT

Petitioners contend that the district court erred by failing to sever their trials based on the antagonistic defenses they presented at trial and that the decision of the court of appeals affirming their convictions conflicts with the decisions of other courts of appeals.⁴ Pet. 3-12. We believe that the court of appeals properly rejected petitioners' claim. Because the decision of the court of appeals, however, conflicts with the decisions of other courts of appeals concerning a question of importance to the

⁴Zafiro did not preserve the severance issue in the courts below. Therefore, she cannot raise the issue here. See *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Addicks v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Each of the other petitioners, however, properly preserved the issue below.

federal criminal justice system, we do not oppose the petition for a writ of certiorari.

1. The courts of appeals have consistently recognized that persons who are indicted together generally should have their guilt adjudicated at a joint trial.⁵ See, e.g., United States v. Warner, No. 90-3753 (6th Cir. Jan. 31, 1992), slip op. 10-11; United States v. Tootick, No. 90-30140 (9th Cir. Dec. 17, 1991), slip op. 16289; United States v. Romanello, 726 F.2d 173, 175 (5th Cir. 1984). Rule 14, Fed. R. Crim. P., however, authorizes district courts to sever the trial if a joint trial will unfairly prejudice the defendant. The courts of appeals review determinations concerning severance for abuse of discretion. See, e.g., Tootick, slip op. 16289; Romanello, 726 F.2d at 177; United States v. Davis, 623 F.2d 188, 194 (1st Cir. 1980).

Unlike the court in this case, other courts of appeals have held that severance is required when defendants present squarely antagonistic defenses. Thus, the Fifth Circuit has held that a defendant may "compel severance" when the defenses at trial are "antagonistic to the point of being irreconcilable and mutually exclusive." Romanello, 726 F.2d at 177; see also United States v. Crawford, 581 F.2d 489, 492 (5th Cir. 1978). The Tenth Circuit has likewise required a severance when the defendants' defenses are "mutually exclusive," so that the acceptance of the defense of one

⁵ Rule 8(b), Fed. R. Crim. P., provides that "[t]wo or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

defendant would "tend to preclude the acquittal of [the other]." United States v. Peveto, 881 F.2d 884, 858 (10th Cir. 1989); United States v. Smith, 788 F.2d 663, 668 (10th Cir. 1986). And the Eleventh Circuit has followed a similar rule. In United States v. Rucker, 915 F.2d 1511 (11th Cir. 1990), the court held that a new trial is required if two defendants' stories are mutually exclusive and irreconcilable so that the "juxtaposition of the co-defendants' protestations of innocence would make each defendant 'the government's best witness against the other.'" Id. at 1513 (quoting Crawford, 581 F.2d at 492).

In holding that mutually exclusive defenses do not require severance, the Seventh Circuit in this case brought itself into conflict with the decisions of the Fifth, Tenth, and Eleventh Circuits.⁶ Under the principles applied in those decisions, petitioners would have been entitled to severance because of their mutually exclusive and irreconcilable defenses. Soto and Garcia were caught transporting a large cardboard box containing 55 pounds of cocaine. Each defendant claimed that he had no knowledge of the

⁶ Other courts have adopted varying formulations of the rule requiring a severance when defendants take positions at odds with those of their co-defendants. In some circuits, conflicting defenses will require severance when the conflict is so prejudicial that the differences are irreconcilable, and the jury will unjustifiably infer that the conflict itself indicates the guilt of both defendants. See, e.g., United States v. Clark, 928 F.2d 639, 644 (4th Cir. 1991); Davis, 623 F.2d at 194-195; United States v. Haldeman, 559 F.2d 31, 71 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977). In addition, the Ninth Circuit recently rejected a per se rule requiring severance whenever co-defendants present mutually exclusive defenses; rather, the court concluded that the need for severance must be evaluated by reference to whether the jury is able "to assess the guilt or innocence of each defendant on an individual and independent basis." Tootick, slip op. 16292.

contents of the box because it belonged to the other defendant. No reasonable juror could have believed that neither of the defendants had dominion and control over the large box of cocaine that both of them were driving across town; hence, the core of each defendant's defense implicated the other in the crime. The same is so with respect to Martinez and Zafiro. If Martinez had stored the suitcase with Zafiro, and Zafiro did not know that it contained 20 pounds of cocaine, that would have tended to preclude Martinez from being acquitted on the theory presented by his lawyer -- that Martinez was unaware of the contents of a suitcase found in someone else's apartment. If, on the other hand, the jury believed Martinez's account, Zafiro's defense would have collapsed.

The conflict among the circuits on this issue is one that warrants resolution by this Court. It is not uncommon in multi-defendant cases for defendants to assert antagonistic defenses. Where it is clear that a crime has been committed and there are only a limited number of likely perpetrators, finger-pointing among the defendants is almost inevitable. What is more, a rule that antagonistic defenses require a severance is likely to provoke pretrial claims of antagonism where defendants have an incentive to seek a severance, but where it is far from clear that the defenses will in fact turn out to be antagonistic. For both reasons, the issue presented in this case arises frequently in federal criminal cases and is an appropriate one for this Court's review.

2. We submit the court of appeals adopted the correct approach to questions of severance under Rule 14 where there are

mutually exclusive and irreconcilable defenses, and that it properly affirmed petitioners' convictions under that approach.

a. As this Court has recognized, "[j]oint trials play a vital role in the criminal justice system." Richardson v. Marsh, 481 U.S. 200, 209 (1986).¹ They promote "the efficiency and the fairness of the criminal justice system" by avoiding separate prosecutions "presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand." Id. at 210. In addition, joint trials "generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability -- advantages which sometimes operate to the defendant's benefit." Ibid.

The court of appeals properly took those considerations into account when it ruled that, in general, a joint trial presenting mutually exclusive defenses will not require severance under Rule 14. The Seventh Circuit's rule reduces "not only the direct costs of litigation, but also error costs." Pet. App. A7. First, joint trials in such cases allow the jury to assess accurately the relative culpability of the co-defendants; in this case, "[t]he jury was given the full picture, which it would not have had if the

¹ The Court in Richardson v. Marsh held that the introduction of a co-defendant's confession at a joint trial does not violate the Confrontation Clause, U.S. Const., Amdt. VI, if the confession on its face does not implicate the defendant. 481 U.S. at 208.

trial had been limited to two of the four alleged conspirators."

Ibid. Second, a joint trial will help avoid the risk of inconsistent verdicts. Id. at A3. As the court of appeals observed:

If it is indeed certain that one and only one of a group of defendants is guilty, the entire group should be tried together, since in separate trials all might be acquitted or all convicted -- and in either case there would be a miscarriage of justice.

Id. at A6.

The court did not foreclose the possibility that severance will be required in some cases in which mutually antagonistic defenses, coupled with other case-specific factors, would affect the jury's ability to render a reliable verdict concerning one or more of the co-defendants. The court cited several examples: (1) a complex conspiracy trial with many co-defendants, if defendants whose involvement was peripheral would be unable to differentiate themselves from the central players, Pet. App. A4; (2) a trial in which "exculpatory evidence essential to a defendant's case will be unavailable -- or highly prejudicial evidence unavoidable -- if [one defendant] is tried with another," id. at A6; or (3) the unlikely case in which all but one of the defendants attempt to place the blame onto one co-defendant, ibid. Those examples, however, follow not from any special rule with respect to antagonistic defenses, but from the general principle under Rule 14 that a court must grant a severance whenever it appears that a joint trial will unfairly prejudice one or more of the defendants. The Seventh Circuit's position, which we endorse, is simply that there should be no flat rule, or even a presumption, requiring a

severance whenever defendants assert antagonistic or mutually exclusive defenses. Because the Seventh Circuit's analysis is at odds with that of several other courts of appeals on an issue of importance to the federal criminal justice system, we do not oppose the petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

KRISTINA L. AMENT
Attorney

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